LEGAL AND POLITICAL DEVELOPMENT OF THE PACIFIC COAST STATES

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THE legal and political conditions of a State are to a large though undefined extent the product of a multitude of social and economic forces. These forces are themselves, in turn, the result of the operation of others, often purely physical, such as climate, geographical location, geological structure and the like. It is a fascinating task to attempt to trace a particular institution to the social conditions which called it into being, and from thence to the natural forces which determined these social conditions. But by reason of the complexity of the problem, because of the ever present personal element, which eludes classification, it is a task fraught with the danger of rash generalization.

It is believed that the legal history of the Pacific Coast States, and particularly that of California, affords excellent material for the study of the influence of natural conditions upon legal and political institutions. Take, for illustration, the fact that gold existed in a free form in the creeks and river beds of the State. Its discovery found the community in the pastoral stage of civilization, without fixed legal principles or definite institutions; it transformed the social system, as if by magic, into a group of vigorous, independent units, struggling for some sort of law and social order. As free gold created the mining camp, so the mining camps gave birth to law all their own. Their popular courts, administering a rude criminal justice, and framed to meet only a temporary exigency, left, it is true, little trace on the future jurisprudence of the State. But the customs evolved in the camps with reference to property rights had more permanent results, and were unique contributions to the legal development of the entire United States. The American law with respect to the discovery, location and development of mining claims owes its character and form to these customs; the law with regard to the appropriation and use of water in the arid and semi-arid States, west of the Mississippi Valley, has been evolved from them. The miner's needs required that water be taken from

the streams and carried in flumes, often a considerable distance, to enable him to work his placer claim. The rule of the older States and of England, whereby the use of running water was limited to him whose land was bounded by the stream, was unsuitable to economic needs and yielded to the greater force. The evolution of vague and indefinite custom into positive law finds no better illustration in modern times than in the process by which the unwritten usages of California gold miners became a most important part of the law of mines and waters.

In many other branches we may trace the direct influence of the frontier civilization which resulted from the sudden settlement of the State by adventurous gold-seekers. The criminal law, as laid down in later statutes and judicial decisions, affords illustrations of miners' conceptions of justice. For many years, the theft of any horse, regardless of its value, was grand larceny, though, generally, to constitute this crime the property stolen must have been worth at least fifty dollars. Even to the present day, the law of California sustains the right of self-defense to an extent not countenanced in most of the older communities—the right of one feloniously attacked to maintain his ground, even if he has to take his assailant's life to do so, rather than to flee, if possible.

These illustrations from the field of criminal law may be supplemented by others from the law which deals with the rights of the citizen. People, including lawyers and judges, are often heard to speak of the right of property as if it were an absolute right, the same in all times and places. A little study of legal history would convince them that property does not mean the same thing in all places and at all times, and its concept is based on social forces. For example, any elementary treatise on general law will point out that under the common law of England and of the States of the American Union any unauthorized entry upon one's land by another, or by another's cattle, gives the right to an action at law in favor of the land owner. But the land owner's property right was never so extensive as this in California. It never was the common law of that State that a man was liable for his cattle's trespasses. The pastoral conditions which preceded the stage of the gold miners, and which continued to exist side by side with the miners' social system, would have made the application of the common law to the situation in California intolerable, and the courts early recognized

that fact. It is only as the agricultural interests have become predominant that the law with regard to trespassing cattle has, by gradual statutory amendment, been placed on a basis similar to that in communities where agriculture was always an important industry.

Even with respect to the other branch of the land owner's fundamental right—his right to sue in a court of record for another's mere entry on his land, though the entry be effected by mistake and without actual damage—the law of California has never been precisely like that of England, which prevails in most of the States. It is true that, theoretically, one may sue in a court of record for a trespass on his land against another who enters even without doing actual damage, and may recover nominal damages. But nominal damages recovered in a district or superior court in California never have carried the right to costs in actions of trespass, as was the case under the common law of England. On the contrary, the party who is awarded only nominal damages must pay the trespasser's costs of suit. Moreover, no general right exists to have the appellate court reverse a case where the jury refuses to give a verdict for the plaintiff, who has only technically suffered an infringement of his right. For a mere trespass, therefore, the land owner may justify his right only at the expense of paying his own and his adversary's costs, and even that slight satisfaction is accorded him at the uncontrolled discretion of a jury of his neighbors. He can not review a jury's refusal to award such damages. The practical absence of legal remedy has a tendency to cause the remedy of self-help to be invoked at the risk of provoking quarrels and breaches of the public peace. The rule as to costs has discouraged resort to the courts for the redress of slight injuries not only in respect to property but to personal rights, such as assaults, slanders and the like. Its effect is practically to remove from the domain of positive law a large and important class of rights. This attitude of the law indicates the frontier influence, the spirit of the gold miner and the herdsman, the willingness to sacrifice legal forms to "rude justice."

We may almost date the beginnings of legal history in the Pacific States from the coming of the gold-seekers to California. Their incursion was so sudden, their personalities so vigorous, that most of the half-formed and primitive institutions of the Mexican era were swept away. So far as concerns

the constitution and frame of government and fundamental rights of the citizen, the older system has contributed nothing to legal history. The political institutions are, it is believed, as if Spain and Mexico had never been. Some elements, however, of the older system in the field of private rights survived the shock of the American invasion, the most important of which are in the field of family law. Considering the disparity between the male and female population in 1850, it was natural that a system of marital rights, fairer in its treatment of woman than the English common law, should have been left undisturbed by the pioneers. Had the settlers come with their wives and families, they would probably have brought with them the common law, as well as the social conditions of the older States, based upon the English law. But the remoteness of the new Eldorado was such that those who came were either young, single men, or they left their families at home—transient gold-seekers. They found already existing a tolerably well established system of marital rights. Neither selfish instincts nor a desire to improve conditions prompted them to change the property rights of the few women in the State. Consequently the Spanish law of the community of goods remained a permanent part of the legal system of California. The wife became to a certain extent a partner with her husband in the gains made during the marriage—an idea far removed from the conception then at the basis of the American law generally, that the husband was the sole owner of such property. To attribute, however, the permanent adoption of the community system in California exclusively to social conditions, based upon the discovery of free gold and the geographical isolation of the territory by ocean, mountains and deserts from the center of population, would, perhaps, be unwarranted. The vitality and force of the system, inherent in the fact that it is based upon more humane conceptions, has enabled it to conquer the common law under conditions not so favorable for its triumph as those that existed in pioneer California. In Washington, for instance, though French and Spanish institutions had but little opportunity of striking root, the State adopted this system of property between the spouses.

The same causes that contributed to perpetuate the community were operative with respect to the subject of marriage in general. Each of the constitutions of California, that of 1849 and that of 1879, has a provision that marriage is a civil con-

tract, enunciating in this respect the theory of the Spanish-Mexican law, which, like the early canon law, permitted the establishment of marriage without either civil or religious ceremony. Until 1895, the statutory law of the State remained in this condition. Since that date solemnization is required to constitute a valid marriage. In the matter of the legitimation and adoption of children, also, Spanish law has had an important influence.

The Spanish-Mexican law theoretically governed the civil rights of all persons in California from the conquest in 1846 until the formal adoption of the common law of England in 1850. Many questions, therefore, have necessarily come before the courts involving rights acquired prior to 1850, especially with reference to land titles, and neither the historian nor the lawyer can afford to neglect the system. But it has affected private rights rather than the main outlines of the law, save in respect to the important survivals noticed.

The work of lawyers and publicists played an important part from the beginning in the moulding of juristic ideas, and the formal bases of the written law were laid by men of experience and learning in public affairs. But these men themselves were colored by the opinions and prejudices of the society in which they lived; they were young, vigorous, untrammeled by precedent, adventurous. The constitution of 1849 was, it is true, an instrument pretty much of the traditional kind. The overshadowing importance of the slavery question made the time one unfavorable to political or social innovation. It was not in the Constitutional Convention, but in the legislature of 1850, that the vigorous and independent public men of the infant State found their expression and tried experiments. From New York came the idea of reform in legal procedure, just introduced by the efforts of David Dudley Field, whose brother, Stephen J. Field was one of the dominant personalities of early California. The distinction between forms of proceeding at law and in equity was abolished, and a fusion of the two systems effected. California was the first State outside of New York to try this experiment, a tremendous forward step in jurisprudence, fundamental in all true legal reform. In the development of its jurisprudence, the State, thanks to this reform, has from the beginning been unhampered by the existence of forms which stand in the way of complete justice. New York also provided the model for the law of real property and conveyancing in the statutes adopted upon this

subject. The desire was for greater simplicity and for greater restrictions upon the power of the individual to withdraw land from commerce by complicated wills and settlements. Traces of New England influence may be found in the laws relative to commercial matters, such as the liability of directors in corporations. The South, too, contributed its share. The system of administration of estates of decedents came from Texas. From the South also came what some foreign jurists regard as one of America's most important contributions to legal concepts—the laws providing for an exemption from execution for debt of a portion of the debtor's property, an application on the positive side of the conception which underlies the principle of the abolition of imprisonment for debt. Homestead and exemption laws are now found in nearly every civilized country in the world. Perhaps, however, the most important statute of the first legislature was that adopting the common law of England rather than the civil law of Spain as the fundamental law of the State.

Professor Royce in his story of California has pointed out how the development of the mechanical methods of the miners reacted upon social conditions, how the evolution from the "pan" through the "rocker" and "cradle," to hydraulic mining and lastly to quartz mining caused a corresponding evolution from a disorganized, anti-social individualism into an economic and political organization which might serve as a true basis for a State. The period of the 50's was that during which this process was taking place. Out of the wreck and chaos of unrestrained individualism, something like order had been brought by the beginning of the Civil War. California was ceasing to be the land of the gold-seeker. The era of agriculture had begun.

The rich soil of California's great plains formed the basis of the State's next era of development, that of the great farms, of railroad building, of commercial expansion. The climate had much to do with the history of this period. The large farm, before the application of irrigation, was an economic necessity. The uncertainty of the rainfall, the dangers of drought, the necessity for transportation to distant markets, required the farmer to be a financier, a man of affairs. Often he was neither. The element of chance controlled almost as it did in the days of gold; the wheat farmer was the slave of the elements. Nor were the great farms conducive to a satisfactory social development. They

tended to the encouragement of a class of wandering laborers, undesirable in the structure of the State, to the employment of the Chinese and the alienation of the white population from agricultural labor, to the intensification of race hatred. The period was not fertile in improvement of legal and political institutions. One of the most notable events during the period was the adoption of the codes in 1872. The attempt to state the law, especially the complicated portion which deals with respect to civil rights, in the form of a code has not often been made in English-speaking countries. The willingness to try experiments which has always characterized the Pacific States is illustrated by the readiness with which the codes were adopted in California, and, once adopted in rather crude form, subsequently neglected.

This readiness to resort to new ideas so characteristic of the optimism of the people, an optimism perhaps in part the result of the even and moderate climate, is well illustrated in the constitution of 1879, the most striking political document of the agricultural era. This instrument is frankly expressive of the farmer's point of view, the farmer who had been the victim of natural and economic forces. The legislature, for example, is directed "to encourage by all suitable means the promotion of intellectual, scientific, moral and agricultural improvement." The temper of the constitutional convention found nothing absurd in the climax. The crude theory that the legislative department should be manacled in order that it may be honest finds full expression. Thirty-three cases are enumerated in which the passage of special laws is forbidden. To prevent fraud, every act must contain the true title, and must deal with only one subject under penalty of being void. No gift of public moneys can be made, no power shall exist to pledge the public money in favor of any private or municipal enterprise. We may smile at these remedies for the purpose of making the people's representatives honest, but the document is a tragical commentary on the public corruption that preceded the date of the convention.

Hostility towards corporations is the keynote of this constitution. It perpetuates the radical provisions of the civil code of 1872, which forbade the creation of corporations with strictly limited liability, and made each stockholder liable for his proportion of the debts of the corporation. An aggregation of persons with strictly limited liability, which the most eminent jurists tell us is an

essential for the proper conduct of modern undertakings, is theoretically impossible under this constitution. Practically, however, the provision regarding stockholders' liability has proved ineffective. Though it has doubtless deterred capital from investment in the State, it has not restrained reckless finance or protected honest creditors.

In spite of its defects, the second constitution of California is instructive to one interested in the larger problems of legal development. The creation of a State Railroad Commission with the power of fixing rates was an innovation in American law. That the commission failed of practical result was due in large part to the fact that the office was elective, and the commissioners for the most part incompetent. It served, nevertheless, as a guide for future legislation, not only in the Pacific States, but throughout the nation. But the most revolutionary feature of the new constitution was its fundamental theory. It recognizes the written constitution as a means of direct legislation. The original theory of the federal and early State constitutions is repudiated, and from a negative instrument defining the powers of the departments of government, the constitution developed into a code of law adopted directly by the people. That the people came to regard it as such a code is apparent from the fact that between 1898 and 1911, one hundred and one amendments were made. Since then the initiative and referendum have become a part of the fundamental law. The line between constitutional amendment and referendum or initiative law is shadowy, and will doubtless become even more vague. In effect, it may be said that California, as well as Oregon and Washington, are living under a system of government far removed from that of New England. The earlier period of legal development had been marked by independence of thought in the field of private law, the more modern period by the same characteristics in the field of public law.

In the latest phase of the development of her law, California has passed out of the economic stage of the wheat farmer into the stage of intensive cultivation of the soil, of the irrigated farm. Horticulture and dairying have become more important than agriculture and mining, while the discovery of petroleum has served to develop many new industries. A marked tendency towards urban growth has come with improved means of transportation. A more complex state of society has been evolved, and with it have come new and different problems.

Legal and Political Development

The recent years have produced the initiative, referendum and recall; woman suffrage; a commission to supersede the former ineffective railroad commission, with powers extending over public utilities other than railroads; workmen's compensation legislation; a direct primary election law; a minimum wage law. The last decade has been an era of fundamental reorganization. We have traveled far from the individualism of the first "diggings" to modern "social insurance." But the daring and venturous character of the miner that, carried too far, often led him to offenses against society, is at the basis of the social and political experiments of the present day—the spirit of optimism, of faith in the future, of trust in humanity.

It would perhaps be unprofitable here to trace the legal history of the other States of the Pacific Coast in detail. Their settlement has been more recent, their development more regular, their departures from normal types generally less marked, and they have largely fallen under the influence of California, so that the history of the law of that State is the key to most of what is novel in their law. In the more recent developments in the line of radical legislation, it is true that Washington and Oregon have in many respects preceded California. The most radical and fundamental piece of modern popular law-making, however, that providing for the making of laws directly by the people, was, as we have seen, the product of the California constitutional convention of 1879.

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